Supreme Court, U.S.
FILED
FEB 26 2001
CLERK

No. 00-1223

In The

Supreme Court of the United States

UNITED STATES OF AMERICA, ex rel. LEON BRAUN,

Petitioner,

v.

SEMINOLE TRIBE OF FLORIDA, INC., AND SEMINOLE TRIBE OF FLORIDA,

Respondents.

On Petition For A Writ Of Mandamus To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

ALLAN M. LERNER, ESQ.
LAW OFFICES OF ALLAN M. LERNER, P.A.
2888 East Oakland Park Boulevard
Fort Lauderdale, FL 33306
Attorney for Respondent, Seminole Tribe of Florida, Inc. a federally chartered tribal corporation
Tel: (954) 563-8111
Fax: (954) 563-8522

DONALD A. ORLOVSKY, ESQ.
Counsel of Record
KAMEN & ORLOVSKY, P.A.
1601 Belvedere Road, Suite 402 South
West Palm Beach, FL 33406
Attorney for Respondent, Seminole Tribe of Florida, a federally recognized Indian tribe
Tel: (561) 687-8500
Fax: (561) 687-7892

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

29 pp

QUESTION PRESENTED

There is really only one question presented in this case: Whether the district court has subject matter jurisdiction to consider a claim brought by an individual *qui tam* relator in the name of the United States against a federally recognized Indian tribe under 25 U.S.C. § 476 and a federally chartered tribal corporation under 25 U.S.C. § 477 for claims allegedly arising under the *False Claims Act of 1986,* 31 U.S.C. §§ 3729-30 et seq.

Stated another way, the petitioner asks this Court whether a federally recognized Indian tribe and a federally chartered tribal corporation are immune from suit under the doctrine of tribal sovereign immunity in connection with a claim brought by an individual *qui tam* relator in the name of the United States under the *False Claims Act of 1986,* 31 U.S.C. §§ 3729-30 et seq.

In his Petition for Writ of Mandamus, Leon Braun, purporting to act as *qui tam* relator and counsel to the United States of America has set forth eight separate disjointed questions, each of which are embraced by the questions presented herein.

TABLE OF CONTENTS

Page

QUESTION PRESENTED..... i

TABLE OF AUTHORITIES..... iii

STATEMENT OF THE CASE..... 1

REASONS FOR DENYING THE WRIT OF MANDAMUS..... 9

CONCLUSION..... 21

TABLE OF AUTHORITIES

Page

CASES

American Indian Agriculture Credit Consortium, Inc. v. Standing Rock Sioux Tribe, 780 F.2d 1374 (8th Cir. 1985) 14

Askew v. Seminole Tribe of Florida, Inc., 474 So.2d 877 (Fla. 4th DCA 1985) 13

Blachford v. Native Village of Noatak and Circle Village, 501 U.S. 775 (1991) 19

Bryan v. Itasca County, 426 U.S. 373 (1976) 17

Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) 11, 15

Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) 17

County of Oneida v. Oneida Indian Nation of New York, 470 U.S. 226 (1985) 17

EEOC v. Cherokee Nation, 871 F.2d 937 (10th Cir. 1989) 18

EEOC v. Fond du Lac Heavy Equipment and Construction Co., Inc. and Fond du Lac Band of Lake Superior Chippewa, 986 F.2d 246 (8th Cir. 1993) 17

Florida Paraplegic Ass'n v. Miccosukee Tribe of Indians, 166 F.3d 1126 (11th Cir. 1999) 9, 10, 12

Kelly v. Boeing Co., 9 F.3d 743 (9th Cir. 1993) 1

Kimel v. State of Florida Board of Regents, 139 F.3d 1426 (11th Cir. 1998) *aff'd* 528 U.S. 62 (2000) 19

TABLE OF AUTHORITIES – Continued

Page

Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751 (1998) 10, 15, 19

Maryland Casualty Co. v. Citizens National Bank, 361 F.2d 517 (5th Cir. 1966) 9, 13

Namekagon Development Company v. Bois Forte Reservation Housing Authority, 517 F.2d 508 (8th Cir. 1975) 12

Native American Church v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959) 15

Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991) 10, 15

Ramey Construction Company, Inc., v. Apache Tribe of Mescalero Reservation, 673 F.2d 315 (10th Cir. 1982) 13

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 10, 13, 15, 19

State of California v. Quechan Tribe of Indians, 595 F.2d 1153 (9th Cir. 1979) 14

State of Florida v. Seminole Tribe, 181 F.3d 1237 (11th Cir. 1999) 9, 10, 12

United States of America ex rel. Glenn A. Hall et al. v. Tribal Development Corporation, 49 F.3d 1208 (7th Cir. 1995) 20

United States of America ex rel. Long v. SCS Business and Technical Institute, Inc., 173 F.3d 870 (D.C. Cir. 1999) 16

United States v. Cooper Corp., 312 U.S. 600 (1941) 16

United States v. Dion, 476 U.S. 734 (1986) 13

TABLE OF AUTHORITIES – Continued

Page

United States v. Kagama, alias Pactah Billy, an Indian, 118 U.S. 375 (1886) 12

United States v. Nice, 241 U.S. 591 (1916) 17

United States v. Sandoval, 231 U.S. 28 (1913) 12

United States v. Santa Fe Pacific Railroad Company, 314 U.S. 339 (1941) 17

United States v. Truckee-Carson Irrigation District, 649 F.2d 1286 (9th Cir. 1981) 17

United States of America ex rel. Jonathan Stevens, qui tam and as relator v. The Vermont Agency of Natural Resources, 163 F.3d 195 (2d Cir. 1998) 14

Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765 (2000) 14

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) 17

Will v. Michigan Department of State Police, 491 U.S. 58 (1989) 16

Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979) 16

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) 15

STATUTES

25 U.S.C. § 81 20

25 U.S.C. § 476 i

25 U.S.C. § 477 i

26 U.S.C. § 7871 14

28 U.S.C. § 1651(a) 2

TABLE OF AUTHORITIES – Continued

Page

31 U.S.C. § 3729 15

31 U.S.C. § 3729(a) 14

31 U.S.C. § 3732 3

OTHER

False Claims Act of 1986, 31 U.S.C. §§ 3729-30 .....1, 2

False Claims Act of 1986, 31 U.S.C. §§ 3729-33 9

F. Cohen, *Handbook of Indian Law* (1982 Ed.)..... 17

Major Crimes Act, 18 U.S.C. § 1152.....7, 20

Major Crimes Act, 18 U.S.C. § 1153..... 20

Title 25 C.F.R., Chapter 39 4

STATEMENT OF THE CASE

Leon Braun (Braun), purporting to act as a *qui tam*[1] relator and "counsel" to the United States of America, has filed a Petition for Writ of Mandamus seeking to have this Court compel the panel of the United States Court of Appeals for the Eleventh Circuit to reverse its judgment affirming a final order of dismissal for lack of subject matter jurisdiction rendered on August 31, 1999 by the United States District Court for the Southern District of Florida (Judge Joan A. Lenard) in connection with a claim arising under the *False Claims Act of 1986* (FCA) which was brought by Leon Braun, as a private individual *qui tam* relator, against the Seminole Tribe of Florida, a federally recognized Indian tribe and Seminole Tribe of Florida, Inc., a federally chartered tribal corporation.[2]

As a preliminary matter, Braun incorrectly assumes that the reversal of the panel decision of the United States

---

[1] "Qui tam" is short for "qui tam pro domino rege quam pro se imposo sequitur," which in English means "who brings the action as well for the king as for himself." *Kelly v. Boeing Co.*, 9 F.3d 743, 746 n.3 (9th Cir. 1993).

[2] Pursuant to Rule 15.2 of the Rules of the Supreme Court of the United States, two fundamental misstatements contained in the petition are noteworthy at the outset. First, Leon Braun has captioned this case solely in the name of the United States instead of in his capacity as an individual *qui tam* relator. The misleading caption should be corrected to reflect the petitioner as United States of America ex rel. Leon Braun, Relator – the same caption used by Braun in the Eleventh Circuit. Secondly, on page 1 of the petition, Braun refers to himself as "counsel/relator" to the United States. To the best knowledge of the undersigned, Braun is not now, nor has he ever been, an attorney at law in any jurisdiction.

Court of Appeals for the Eleventh Circuit affirming the final order of the United States District Court for the Southern District of Florida dismissing the claim brought by Braun in the name of the United States under the FCA is a ministerial duty subject to a writ of mandamus. Rule 20.1 of the Rules of the Supreme Court of the United States makes clear that issuance by the Court of an extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised. In order to justify the issuance of such a writ, the petitioner must show, among other things, that adequate relief cannot be obtained in any other form. In this case, it is clear that Braun could have filed a petition for writ of certiorari in accordance with Rule 14 of the Rules of the Supreme Court of the United States.

Braun's petition fails to set forth a cogent statement of either the facts or the case leading up to the filing of his petition. Accordingly, a statement of the facts and of the case is set forth below:

1. Background and Procedural History:

On June 5, 1998, Braun, as relator, brought a *qui tam* action against the Seminole Tribe of Florida (Seminole Tribe) and Seminole Tribe of Florida, Inc. (Tribe Inc.) arising under the *False Claims Act* of 1986 (FCA), 31 U.S.C. §§ 3729-30 *et seq.* In his complaint, Braun claims that the Seminole Tribe is responsible for certain unlawful actions which he claims " . . . include but are not limited to" the following:

> Causing to be presented to an officer or employee of the United States Government a

> false or fraudulent claim for payment or approval;
>
> Knowingly making or causing to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;
>
> Having possession, custody, or control of public property or money used, or to be used, by the government and, intending to defraud the Government or wilfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt; and
>
> Making, using or causing to be made or used, a false record or statement to conceal, avoid or decrease an obligation to pay or transmit money or property to the Government.
>
> (Complaint at ¶ 16)

In his complaint, Braun contends, as he does in his petition, that the district court has subject matter jurisdiction arising under 31 U.S.C. § 3732 to consider his *qui tam* action against the Seminole Tribe and Tribe Inc. (Complaint at ¶ 4). Having reviewed Braun's once sealed complaint, the federal government elected not to intervene.

In his complaint, Braun alleges that the Seminole Tribe and Tribe Inc. received significant sums of money from the federal government which is intended to help the Seminole Tribe . . . "help itself" (Complaint at ¶ 5) and that any and all expenditures of the Seminole Tribe are to be " . . . monitored and approved by the Department of the Interior, through the Bureau of Indian Affairs." (Complaint at ¶ 6). Braun alleges that in order to

facilitate the federal government's monitoring process, the Seminole Tribe is required to provide the Bureau of Indian Affairs (BIA) with a periodic accounting of tribal expenditures which, according to Braun, is a precondition to the receipt of federal funding. Braun claims that the Seminole Tribe and Tribe Inc. have failed to account to the BIA " . . . or to account accurately" their expenditures and have deliberately or recklessly made and used false records in order to obtain approval for additional governmental funding. (Complaint at ¶¶ 8 & 9). In his complaint, Braun asserts that he has requested copies of the accounting reports submitted by the Seminole Tribe to the BIA but has allegedly discovered that the BIA is not in possession of such reports.

In his complaint, Braun goes on to assert that as a further condition to governmental funding, the Seminole Tribe is required to submit annual outside audits of gaming revenues to the federal government which are calculated to demonstrate that there are no expenditures contrary to the requirements of Title 25 C.F.R., Chapter 39. (Complaint at ¶ 11). Braun further contends that he has also requested copies of these audit reports from the BIA but has learned that no such reports have been submitted by the Seminole Tribe. (Complaint at ¶¶ 12 & 13).[3]

---

[3] With respect to Tribe Inc., it should respectfully be noted that Tribe Inc.'s business operations are confined primarily to agriculture, citrus, tobacco and cattle. Tribe Inc. operates separately and distinctly from the Seminole Tribe with a Board of Directors having a total composition that is different from that of the Tribal Council of the Seminole Tribe. It also has its own budget. Moreover, at no time and under no circumstances

In ¶ 14 of the complaint, Braun contends that the Seminole Tribe's " ' . . . failure to submit annual audit reports of gaming revenues causes a false record to exist . . . ' and thereby causes inappropriate approval by the federal government of funding to the 'Tribal Defendant.' "

On March 3, 1999, the Seminole Tribe filed a motion to dismiss for lack of subject matter jurisdiction based upon tribal sovereign immunity. In their motions[4] the Seminole Tribe and Tribe Inc. took the position that they cannot be sued unless: (1) Congress has specifically abrogated tribal sovereign immunity within the FCA; or (2) the immunity of the tribal defendants from suit has been waived through the deliberative acts of their respective governing bodies, sitting in legal session. In support of its dispositive motion, the Seminole Tribe filed the unrefuted affidavits of Max B. Osceola, Jr., a member of the Tribal Council of the Seminole Tribe, together with the affidavit of Mary Jane Willie, the Official Tribal Clerk of the Seminole Tribe. Attached to these unrefuted defense affidavits

---

has Tribe Inc. ever had any interest in the gaming operations of the Seminole Tribe which have been operated as a subordinate governmental unit of the Tribe itself. The revenues of tribal gaming are, as a practical matter, a tax substitute since tribal taxation is insufficient to support the governmental operations of the Tribe and gaming revenues are used in large part for that purpose as well as to support tribal membership. These facts were established conclusively for the purpose of this case before the district court in the unrefuted affidavit of Max B. Osceola, Jr., a member of the Tribal Council of the Seminole Tribe of Florida.

[4] Tribe Inc. joined in the Seminole Tribe's motion on March, 9, 1999.

is a copy of Tribal Ordinance C-01-95 which is the Tribal Sovereign Immunity Ordinance of the Seminole Tribe which was duly enacted by the Tribal Council of the Seminole Tribe on March 16, 1995 and unconditionally approved by the United States Department of the Interior on April 19, 1995. This Tribal Ordinance restates, as a matter of law, that tribal sovereign immunity is applicable not only to the Seminole Tribe and its subordinate governmental units but to its officials, employees and authorized agents as well. It reads, in pertinent part, as follows:

> NOW THEREFORE BE IT ORDAINED: that the Seminole Tribe of Florida, its subordinate economic and governmental units as well as its tribal officials, employees and authorized agents are immune from suit brought by any third-party in any state or federal court absent the clear, express and unequivocal consent of the Seminole Tribe of Florida or the clear, express and unequivocal consent of the United States Congress. This immunity shall apply whether the Tribe or any subordinate economic or governmental unit is engaged in private enterprise or governmental function; and
>
> BE IT FURTHER ORDAINED: that all tribal officials, employees or other authorized agents shall likewise be immune from suit brought by any third-party in any state or federal court where such tribal official, employee or other authorized agent is either acting on behalf of the Seminole Tribe of Florida in the course of their agency or where the acts of such tribal official, employee or other agent, though mistaken, negligent or otherwise improper are within that degree of authority which the Seminole Tribe of

> Florida is capable of bestowing upon the agent as a matter of federal, constitutional or tribal law;. . . .

On March 17, 1999, Braun filed a response to the Seminole Tribe's motion stating that the FCA does not explicitly immunize tribal groups from being sued. In support of his position, Braun, among other things, contends that the *Major Crimes Act* expressly states that " . . . the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except of the District of Columbia, shall extend to the Indian country." *Major Crimes Act*, 18 U.S.C. § 1152. From this, it appears that Braun deduces what he perceives is a Congressional mandate that permits him to sue tribal defendants civilly in federal court under the FCA because they allegedly violated the Major Crimes Act. Braun further appears to maintain that the issue of a tribal waiver of sovereign immunity is irrelevant because the Seminole Tribe and Tribe Inc. are allegedly not immune under the *Major Crimes Act*.

In support of their motions to dismiss for lack of subject matter jurisdiction, Seminole Tribe and Tribe Inc. submitted unrefuted evidence that there is no resolution, ordinance, or other official document or record evidencing any voluntary consent or waiver on the part of the Seminole Tribe or Tribe Inc. to be sued in any civil or other action by a *qui tam* relator under the FCA. In addition to the complete absence of any voluntary waiver of sovereign immunity as to the Seminole Tribe or Tribe Inc., there is no applicable federal statute enacted pursuant to the plenary power of Congress which clearly and

unmistakably abrogates tribal immunity so as to permit respondents to be subject to cases brought by *qui tam* plaintiffs – purporting to do the government's business as "private attorneys general" – in violation of the government-to-government trust relationship that exists between Indian tribes and the federal government for the benefits of tribes. Nowhere in any brief or other submission in the record does Braun appear to refute the concern expressed by the Seminole Tribe that if FCA litigation is permitted, such litigation could consume the limited asset and revenue base of the tribal entities in perpetual defense of such actions, no matter how frivolous.

On March 24, 1999, the Seminole Tribe filed its reply in support of its motion to dismiss for lack of subject matter jurisdiction.[5] On August 31, 1999, the district court granted the tribal defense motions to dismiss for lack of subject matter jurisdiction based upon the doctrine of tribal sovereign immunity and the inapplicability of the FCA to Indian tribes and tribal entities.

Braun timely filed a notice of appeal in the United States Court of Appeals for the Eleventh Circuit seeking to challenge a final order of the United States District Court for the Southern District of Florida dismissing Braun's complaint against the Seminole Tribe and Tribe Inc. for lack of subject matter jurisdiction based upon their immunity from suit under the doctrine of tribal sovereign immunity. Following the submission of briefs

---

[5] Tribe Inc. joined in the reply on March 26, 1999.

and a *de novo* review of the issue of respondents' sovereign immunity from suit, the Eleventh Circuit issued an unpublished *per curium* opinion affirming the final order of the district court. In its unpublished opinion, the Eleventh Circuit panel stated:

> Leon Braun appeals *pro se* the district court's dismissal of his claim against the Seminole Tribe of Florida, Inc., chartered in 1957, and the Seminole Tribe of Florida, under the False Claims Act, 31 U.S.C. §§ 3729-33. Given the lack of a pertinent, unequivocal, and expressed waiver of tribal immunity, the district court did not err in dismissing Braun's complaint for want of subject matter jurisdiction, based upon the doctrine of tribal sovereign immunity. [G]enerally,(sic) *Florida v. Seminole Tribe*, 181 F.3d 1237 (11th Cir. 1999), *Florida Paraplegic Ass'n v. Miccosukee Tribe of Indians*, 166 F.3d 1126 (11th Cir. 1999), and *Maryland Casualty Co. v. Citizens National* (sic) *Bank*, 361 F.2d 517, 520-21 ([5]th Cir. 1966). (sic)
>
> AFFIRMED.

A judgment of affirmance was rendered by the Clerk of the United States Court of Appeals for the Eleventh Circuit. Following the denial of Braun's timely motion for rehearing, the court thereafter reissued its judgment as a mandate on November 7, 2000. This petition for mandamus to the Eleventh Circuit panel follows in this Court.

REASONS FOR DENYING THE PETITION FOR WRIT OF MANDAMUS

The panel of the United States Court of Appeals for the Eleventh Circuit properly exercised its discretion in

affirming the final order of the district court which dismissed Braun's complaint against the Seminole Tribe and Tribe Inc. This decision, following a *de novo* review, was in no way ministerial but involved the court's exercise of proper judicial discretion and analysis by the panel in determining whether the district court lacked jurisdiction over the Seminole Tribe and Tribe Inc. under the doctrine of tribal sovereign immunity in connection with a case purportedly arising under the FCA. In this regard, there does not appear to be a proper basis for Braun to seek a writ of mandamus against the members of the panel who affirmed the final order of the district court. In the event that this Court should construe Braun's petition for writ of mandamus to be a petition for writ of certiorari to the Eleventh Circuit Court of Appeals, the respondents have set forth below additional reasons why the writ should not be granted.

The district court properly dismissed Braun's claim arising under the FCA for lack of subject matter jurisdiction based upon the doctrine of tribal sovereign immunity. "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Accordingly, a suit against an Indian tribe must be barred unless the tribe has clearly waived its immunity or Congress has expressly abrogated that immunity by authorizing the suit. *See, Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998); *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991); *State of Florida v. Seminole Tribe of Florida*, 181 F.3d 1237, 1241, (11th Cir. 1999); and *Florida Paraplegic Assoc.*,

Inc. v. Miccosukee Tribe of Indians, 166 F.3d 1126, 1130-1131 (11th Cir. 1999).

The federally recognized tribal sovereignty of Indian tribes lies at the heart of the special and unique relationship that exists between the United States and Indian tribes: that of a conquering sovereign to a conquered sovereign. This relationship has been defined as most akin to that of a guardian to its ward, as stated by Chief Justice John Marshall in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831):

> Meanwhile, they are in a state of pupilage; their relationship to the United States resembles that of a ward to his guardian.

Fifty years later, this Court redefined the relationship between the United States and Indian tribes in the same vein when it stated:

> These Indian tribes are the wards of the nation. They are communities *dependent* on the United States, – dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive, and by congress, and by this court, whenever the question has arisen.

United States v. Kagama, alias Pactah Billy, an Indian, 118 U.S. 375, 384-385 (1886); *see also, United States v. Sandoval,* 231 U.S. 28 (1913).

It is clear from the unrefuted evidence in the record that there is no tribal waiver or Congressional abrogation of tribal immunity in this case. In fact, under no circumstances has the Tribal Council of the Seminole Tribe or the Board of Tribe Inc. – through any deliberative act while sitting in legal session or otherwise – voluntarily agreed to be subject to suit in any court for claims arising under the FCA. Thus, the only remaining question is whether Congress, in enacting the FCA intended for the Act to reach the conduct of Indian tribes and federally chartered tribal corporations.

It is well settled that "Congress abrogates tribal immunity only where the definitive language of the statute itself states an intent either to abolish Indian tribes' common law immunity or to subject tribes to suit under the Act." *State of Florida v. Seminole Tribe of Florida,* 181 F.3d 1237, 1241-1242 (11th Cir. 1999); *quoting from Florida Paraplegic Assoc., Inc. v. Miccosukee Tribe of Indians of Florida,* 166 F.3d at 1131. For reasons more fully hereinafter set forth, it is clear that no such Congressional abrogation exists that is applicable to this case.

Indian tribes have always been considered to have an immunity from suit similar to that enjoyed by the federal government. *Namekagon Development Company v. Bois Forte Reservation Housing Authority,* 517 F.2d 508, 510 (8th Cir. 1975). Moreover, since an Indian tribe's sovereign immunity is coextensive with that of the United States, a party may not maintain a claim against an Indian tribe or

any of its subordinate governmental units or agents absent a firm showing of an effective waiver which is *unequivocally* expressed. *Ramey Construction Company, Inc., v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 319-321 (10th Cir. 1982). A waiver of tribal sovereign immunity may *never* arise by implication against an Indian tribe or any of its subordinate units or its agents. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978).

In this case, Braun has suggested throughout that Congress intended to make the FCA applicable to Indian tribes because Congress allegedly made the *Major Crimes Act* applicable to Indian tribes. As Braun should be well aware, neither a waiver nor an abrogation of tribal immunity may arise by implication against an Indian tribe. If a waiver or abrogation of tribal sovereign immunity exists – by the Tribe or by Congress – the waiver or abrogation must be clear, express and unmistakable. *United States v. Dion*, 476 U.S. 734, 738-739 (1986). No such abrogation or waiver exists in this case.

In addressing the Seminole Tribe's entitlement to immunity from suit under the doctrine of tribal sovereign immunity, the courts have refused to distinguish whether the Tribe (or a federally chartered tribal corporation) is engaged in a private enterprise or governmental function. *Maryland Casualty Company v. Citizens National Bank of West Hollywood*, 361 F.2d 517, 520-521 (5th Cir. 1966). In *Maryland Casualty Company*, it was held that the Seminole Tribe's agent, Tribe Inc., a federally chartered tribal corporation, was equally immune from suit while engaged in a private commercial enterprise – a position that continues to receive widespread recognition. *Askew v. Seminole Tribe of Florida, Inc.*, 474 So.2d 877 (Fla. 4th DCA

1985). *See also, American Indian Agriculture Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir. 1985).

Sovereign immunity is a right of the sovereign. The doctrine goes to the power of the court and not to the subject matter of the dispute. As the Ninth Circuit said in *State of California v. Quechan Tribe of Indians*, 595 F.2d 1153 (9th Cir. 1979), "Sovereign immunity involves a right which courts have no choice, in the absence of a waiver, but to recognize. It is not a remedy. . . . " *Id.* at 1155.

On May 22, 2000, this Court, in the case of *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), reversing *United States of America ex rel. Jonathan Stevens, qui tam and as relator v. The Vermont Agency of Natural Resources*, 163 F.3d 195 (2d Cir. 1998), held that the FCA does not subject a state or state agency to liability in such actions. In fact, in that case, this Court expressly rejected the Second Circuit's holding that a state or state agency is a "person" subject to *qui tam* liability under 31 U.S.C. § 3729(a) of the FCA which subjects to liability "[a]ny person" who, *inter alia*, "knowingly presents or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval." Although federally recognized Indian tribes are not ordinarily recognized as states or state agencies[6] it is well settled that Indian tribes are recognized as dependent political sovereign governments possessing common law immunity

---

[6] Congress has, on occasion recognized Indian tribes to be deemed to be states for certain limited purposes. See, e.g., 26 U.S.C. § 7871.

from suit traditionally enjoyed by sovereign powers. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.* 523 U.S. 751 (1998); *Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe,* 498 U.S. 505, 509 (1991); *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58-59 (1978). As dependent sovereign governments, Indian tribes have been held to have a status that is unique from all other forms of sovereign governments giving tribes " . . . a status higher than that of a State." *Native American Church v. Navajo Tribal Council,* 272 F.2d 131, 134 (10th Cir. 1959).

The language of the FCA, as set forth in 31 U.S.C. § 3729 *et seq.*, does not disclose on its face, or anywhere in its legislative history, any clear or unmistakable Congressional intention to abrogate tribal sovereign immunity in order to apply the Act to sovereign Indian tribes. Nowhere is there any reference to the FCA being applicable to Indian tribes. In passing the FCA, Congress could have easily exercised its plenary power over Indian tribes to include Indian tribes within the definition of a "person" and applied the Act as a limitation upon tribal sovereignty. Congress could have also easily expressed an intention to permit federal and state courts to assume jurisdiction over resident Indian tribes in civil disputes arising under the FCA. It chose not to do so.

Congress clearly had the benefit of *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832); and *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1 (1831), when it passed the FCA during the Lincoln Administration. Further, Congress had the benefit of a rich bloodline of this Court's decisions requiring unmistakable clarity in the abrogation of tribal sovereign immunity when it revised the FCA in 1986. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978).

Congress was clearly aware of its plenary power over Indian tribes and how to exercise it; nevertheless, it omitted all references to Indian tribes in the FCA and all revisions to it. Thus, the language of the FCA, and its unmistakable omission of any reference to Indian tribes, makes it clear that Congress did not intend the statute to abrogate tribal sovereign immunity.

In order for Braun's claim to be upheld, he must demonstrate, among other things, that the term "person" (i.e., the one liable for making a false claim) in Section 3729(a) of the FCA includes sovereign Indian tribes and federally chartered tribal corporations. In that respect, Braun has "no little burden" because the statute does not define the term "person" and, as this Court has remarked before, "in common usage 'person' does not include the sovereign [and] statutes employing the [word] are ordinarily construed to exclude it." *See, United States of America ex rel. Long v. SCS Business and Technical Institute, Inc.*, 173 F.3d 870 (D.C. Cir. 1999) *quoting from, Will v. Michigan Department of State Police*, 491 U.S. 58, 64 (1989); *also quoting from Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 667 (1979) and *United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941). On this basis alone, it would appear tenuous at best to suggest that Congress intended the FCA to apply to tribal sovereigns.

Even if the language contained in the FCA is found to create an ambiguity as to whether Congress intended to apply the FCA to federally recognized Indian tribes, such ambiguity must *always* be resolved in favor of the tribal sovereign since it is well settled as a canon of construction that any ambiguities or doubtful expressions in statutes regarding Indian tribes are to be liberally construed

and resolved in favor of the tribes. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 178 (1989); *United States v. Santa Fe Pacific Railroad Company*, 314 U.S. 339, 354 (1941); *United States v. Truckee-Carson Irrigation District*, 649 F.2d 1286, 1298 (9th Cir. 1981). *See also, Bryan v. Itasca County*, 426 U.S. 373 (1976).

"The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians," *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226, 247 (1985). Because Congress' authority to legislate unilaterally on behalf of the Indians derives from the presumption that Congress will act with benevolence, courts "have developed canons of construction that treaties and other federal action should, when possible, be read as protecting Indian rights and in a manner favorable to Indians." F. Cohen, *Handbook of Indian Law* at 221 (1982 Ed.). "Doubtful expressions are to be resolved in favor of the [Indians]." *United States v. Nice*, 241 U.S. 591, 599 (1916). "Ambiguities in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-144 (1980).

By way of analogy, the case of *EEOC v. Fond du Lac Heavy Equipment and Construction Co., Inc. and Fond du Lac Band of Lake Superior Chippewa*, 986 F.2d 246 (8th Cir. 1993) examined the question of whether the *Age Discrimination in Employment Act* (ADEA) should be held to be applicable to Indian tribes given the fact that Indian tribes are not mentioned anywhere in either the language of the statute or its legislative history. In that case, the EEOC, an

agency of the federal government, sought to enforce the ADEA against a federally recognized Indian tribe and one of its tribal businesses in connection with the denial of employment to a prospective employee because of his age. Following *EEOC v. Cherokee Nation*, 871 F.2d 937 (10th Cir. 1989), the court found that Congress did *not* intend the ADEA to apply to Indian tribes. In that regard, the court noted as follows:

> . . . Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess . . . The question presented in this case is whether Congress did so when enacting the ADEA.
>
> The Supreme Court has stated that "general acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary." . . . (citation omitted) This general rule in *Tuscarora*, however, does not apply when the interest sought to be affected is a specific right reserved to Indians (citation omitted) . . . Specific Indian rights will not be deemed to have been abrogated or limited absent a "clear and plain" Congressional intent . . . (citations omitted). A clear and plain intent may be demonstrated by an "express declaration" in the statute, by the "legislative history" and by "surrounding circumstances." *Dion*, 476 U.S. at 739.
>
> * * *
>
> Because the Tribe's specific right of self-government would be affected, the general rule of applicability does not apply. . . .

986 F.2d at 247-249.

In *Kimel v. State of Florida Board of Regents*, 139 F.3d 1426 (11th Cir. 1998), *aff'd* 528 U.S. 62 (2000), this Court, using a similar analysis to that employed in *United States v. Dion*, 476 U.S. 734 (1986), was called upon to determine whether Congress intended to abrogate Eleventh Amendment immunity to states in connection with certain employment discrimination statutes. Citing this Court's decision in *Blachford v. Native Village of Noatak and Circle Village*, 501 U.S. 775 (1991), the Eleventh Circuit noted, *inter alia*, that before Eleventh Amendment immunity can be successfully abrogated:

> . . . Congress must have intended to abrogate that immunity by providing "a clear legislative statement" of its intent – "making its intention unmistakably clear in the language of the statute."

Kimel, 139 F.3d at 1430.

None of the statutes in question contained an unequivocal expression of an intent to abrogate immunity with unmistakable clarity. This analysis becomes particularly important in view of this Court's pronouncement that a waiver of tribal sovereign immunity – whether by tribal act or congressional abrogation – may not arise by way of implication. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978).

On May 26, 1998, this Court made its most recent, and arguably significant pronouncement on the issue of tribal sovereign immunity in the case of *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.* 523 U.S. 751 (1998). In that case, this Court acknowledged that the entitlement of Indian tribes to immunity from suit under

the doctrine of tribal sovereign immunity falls within the plenary power of Congress and that absent an unmistakably clear congressional declaration abrogating or limiting the entitlement of an Indian tribe to sovereign immunity, suits against Indian tribes under circumstances where there is no tribal consent or congressional abrogation must be dismissed for lack of subject matter jurisdiction on the grounds of tribal sovereign immunity.

In his opening brief in the Eleventh Circuit, Braun purports to predicate subject matter jurisdiction for his civil FCA upon the criminal statutory language of the *Major Crimes Act* (18 U.S.C. § 1153) and the *Indian Country Crimes Act* (18 U.S.C. § 1152). Both of these statutes provide for *criminal* jurisdiction over individuals in federal courts relative to criminal acts arising in Indian country. Neither of these statutes creates a private cause of action against a governmental entity such as the Seminole Tribe or Tribe Inc. for the alleged violation of a civil statute such as the FCA.

In his petition for writ of mandamus, Braun cites as authority the case of *United States of America ex rel. Glenn A. Hall et al. v. Tribal Development Corporation*, 49 F.3d 1208 (7th Cir. 1995) (petition at 4 and 11) for the proposition that federal courts have considered *qui tam* actions involving Indian tribes prior to this case. What Braun neglects to tell this Court is that the *Hall* case was an action arising under 25 U.S.C. § 81 against a non-tribal Wisconsin corporation which sold goods to a gaming facility on reservation land. *Hall* did not involve a tribal entity and did not arise under the FCA. As such, it is distinguishable and inapplicable as noted in the comprehensive opinion by Judge Manion of the Seventh Circuit.

In short, the law cited by Braun is inapplicable to Indian tribes and certainly fails to grant, by implication or otherwise, any civil jurisdiction for claims purporting to arise under the FCA. In this case, Braun attempts, once again, by implication, to confer jurisdiction over alleged FCA violations raised by individual *qui tam* relators. However, Braun has failed to cite to any case to support a cognizable jurisdictional basis for a civil FCA claim against the tribal respondents brought by an individual *qui tam* relator without government participation.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that neither the Seminole Tribe nor Tribe Inc. have consented to be sued under the FCA through the deliberative acts of their governing bodies. Additionally, nowhere in the FCA does there appear a clear and unmistakable intent of Congress to make the FCA applicable to sovereign Indian tribes.

It is respectfully submitted that the *de novo* review of the record by the United States Circuit Court of Appeals for the Eleventh Circuit correctly affirmed the district court's dismissal of Braun's complaint arising under the FCA for lack of subject matter jurisdiction based upon the

doctrine of tribal sovereign immunity. For this reason, its is respectfully submitted that Braun's petition for writ of mandamus to the panel should be denied.[7]

Respectfully submitted,

DONALD A. ORLOVSKY, ESQ.
Counsel of Record
KAMEN & ORLOVSKY, P.A.
1601 Belvedere Road,
Suite 402 South
West Palm Beach, FL 33406
Attorney for Respondent,
Seminole Tribe of Florida, a federally recognized Indian tribe
Tel: (561) 687-8500
Fax: (561) 687-7892

ALLAN M. LERNER, ESQ.
LAW OFFICES OF ALLAN M. LERNER, P.A.
2888 East Oakland Park Boulevard
Fort Lauderdale, FL 33306
Attorney for Respondent,
Seminole Tribe of Florida, Inc.
a federally chartered tribal corporation
Tel: (954) 563-8111
Fax: (954) 563-8522

---

[7] In the event that this Court should construe Braun's petition to be one of certiorari directed to the United States Court of Appeals for the Eleventh Circuit, it is respectfully submitted that for the same reasons, Braun's petition, as so construed, should likewise be denied.